BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLORIA DELGADO	)	
Claimant	)	
	)	
VS.	)	Docket Nos. 265,611
	)	and 267,234
TYSON FRESH MEATS, INC.[1]	)	
Self Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 18, 2008, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 4, 2009. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the self-insured respondent.

In Docket No. 265,611, the Administrative Law Judge (ALJ) denied compensation after finding that claimant failed to submit a timely written claim. Workers compensation benefits were also denied in Docket No. 267,234. In that claim, the ALJ concluded that claimant failed to prove she suffered personal injury or injuries by accident or accidents. Because these findings were dispositive of the two claims, the ALJ did not rule on the remaining issues. During oral argument to the Board, the parties agreed that in the event the Board reverses the ALJ on either or both of these determinations, then the Board should decide the remaining issues without remanding the matter to the ALJ.

The Board has considered the record and adopted the stipulations listed in the Award. In addition to the record listed in the Award, the Board notes the record also includes the transcript of the deposition of Bud Langston taken November 14, 2002, and the attached exhibit, as well as the transcript of the deposition of Kimball Stacy, M.D., taken August 26, 2003, and the attached exhibit. The Board also notes that the evidentiary file in Docket No. 250,157 includes the administrative file; the transcript of the Preliminary Hearing held February 4, 2000; the transcript of the Post Award Hearing held July 18, 2003, the transcript of the Evidentiary Deposition of Edward J. Prostic, M.D., taken

[1] Formerly IBP, Inc.

February 3, 2004, and the attached exhibits; the transcript of the Regular Hearing held July 2, 2004; and the transcript of the Post Award Hearing held June 1, 2007.

ISSUES

In Docket No. 265,611, the Board is asked to review the following issues: (1) what is the date of accident; (2) did claimant sustain an accidental injury arising out of and in the course of employment; (3) did she provide timely notice of accident; (4) did she serve timely written claim on respondent; (5) what is the nature and extent of her disability, if any; and (6) is she entitled to future and unauthorized medical compensation? Claimant argues that she met with injury by accident that arose out of and in the course of her employment on either January 1, 1997, or January 1, 1998, and that she provided timely notice. She argues that although she did not file her E-1 until May 10, 2001, she provided timely written claim because respondent began making voluntary payments following the filing of that application and those payments satisfied the tolling provision in K.S.A. 44-520a(a). Claimant contends she suffered an 18 percent permanent partial impairment to her left leg as a result of her January 1, 1997 or 1998, slip and fall at work.

In Docket No. 267,234, claimant sets out the issues as: (1) whether she sustained an accidental injury arising out of and in the course of employment; (2) whether she provided timely notice; (3) nature and extent of disability, if any; and, (4) whether she is entitled to future and unauthorized medical compensation. Claimant argues she met with personal injury or injuries in the course of her employment with respondent in a series of accidents from May 31, 2000, through April 24, 2001, and that she provided timely notice of her injuries. She argues that as a result of her injuries, she is permanently and totally disabled. In the alternative, claimant alleges she is entitled to a work disability award of 89.5 percent based on a 79 percent task loss and a 100 percent wage loss.

Respondent argues that in Docket No. 265,611, claimant failed to provide respondent with timely notice of accident and a timely written claim for compensation. Further, respondent argues that claimant failed to prove that she met with personal injury by accident that arose out of and in the course of her employment on January 1, 1998. Respondent also argues claimant cannot claim she was injured on January 1, 1997, because she never amended her application for hearing and claim for compensation to allege that date of accident.

Regarding Docket No. 265,634, respondent argues that claimant failed to meet her burden to prove that she suffered additional injury or injuries that arose out of and in the course of her employment with respondent from May 31, 2000, through her last day worked, April 24, 2001. Respondent contends that claimant's current condition is either due to factors personal to her and are not related to her work at respondent or that her injuries are the result of the accidents alleged in Docket Nos. 250,157 and 265,611. In the alternative, respondent argues claimant is limited to her percentage of functional impairment and that respondent is entitled to a credit for preexisting impairments.

Respondent further argues that claimant is not entitled to a reconsideration of her entitlement to a work disability, as that issue was decided adversely to her in Docket No. 250,157.

The issues for the Board's review in Docket No. 265,611 are:

(1) What is claimant's date of injury?

(2) Did claimant sustain injury or injuries by accident that arose out of and in the course of her employment with respondent?

(3) Did claimant provide timely notice of her alleged accident?

(4) Did claimant provide respondent with timely written claim for her alleged injuries?

(5) What is the nature and extent of claimant's disability?

(6) Is claimant entitled to future and unauthorized medical compensation?

The issues for the Board's review in Docket No. 267,234 are:

(1) Did claimant sustain injury or injuries by accident that arose out of and in the course of her employment with respondent?

(2) Did claimant provide timely notice of her alleged accident?

(3) What is the nature and extent of claimant's disability?

(4) Is claimant entitled to future and unauthorized medical compensation?

(5) Is claimant barred from receiving a permanent partial disability award based on a work disability, as that issue was decided adversely to her in Docket No. 250,157?

(6) Is respondent entitled to a credit for any preexisting conditions, impairments, or prior awards?

FINDINGS OF FACT

Docket No. 250,157

Claimant has filed three workers compensation claims alleging injuries suffered while working for respondent. In Docket No. 250,157, claimant claimed she injured her "hands, wrists, arms, shoulders, neck, back, left leg and all parts of body affected" "each

day worked through 11-15-99 and each day thereafter, continuing her employment" caused by the "repetitive use of hands, wrists, arms, shoulders, neck and all parts of body affected."[2] This claim was settled on October 24, 2000, and on November 2, 2000, the parties filed a Stipulation for Agreed Award showing the case was settled based on an 11.5 percent permanent partial impairment to the body as a whole. This rating was based on ratings from Dr. Edward Prostic of May 9, 2000, and Dr. Sergio Delgado of June 9, 2000. Dr. Prostic's May 9, 2000, rating report states that claimant was seen for numerous complaints but he believed her dominant problem was instability of the shoulders, and his rating was only for those conditions. Dr. Delgado's June 9, 2000, report set out that claimant had lately been having complaints related to her lower extremities. However, he only gave claimant a rating for her bilateral shoulders and her cervicothoracic area. Respondent terminated claimant on April 24, 2001. She subsequently filed an application for review and modification, arguing that she was entitled to a work disability. In a decision rendered October 28, 2004, the ALJ found that claimant had been terminated for cause and imputed the wages she was earning while working for respondent for the purpose of her post-injury wage and denied her request for a work disability. The Board affirmed the ALJ in its order of May 27, 2005; the Court of Appeals affirmed the Board on May 19, 2006; and the Supreme Court denied review on September 19, 2006. This claim is not before the Board on review, but, by stipulation of the parties, the entire evidentiary record in Docket No. 250,157 has been made a part of the record in Docket Nos. 265,611 and 267,234 for consideration by the ALJ and by the Board.

Docket No. 265,611

In Docket No. 265,611, claimant testified that on January 1, 1997, she fell at work and injured her left knee and back. Claimant told the supervisor that she had fallen and wanted to see a nurse, but she was not sent for medical treatment. She did not mention her fall and injuries to anyone in a supervisory capacity the day after her fall but kept working despite the pain. However, she continued to complain of injuries to personnel in the medical clinic. Finally, in May 2000, after she again complained of injuries from her fall, respondent sent her to see Dr. J. Rob Hutchison.[3] In July 2000, claimant was seen by Dr. Jeffrey MacMillan. Her performed arthroscopic partial left lateral meniscectomy on December 6, 2000. Respondent paid claimant one week of temporary total disability benefits for the period from December 13, 2000, to December 19, 2000, in the amount of $287.38. Claimant filed an Application for Hearing on May 10, 2001, claiming she was injured on January 1, 1998, when she slipped and fell, injuring her “[l]eft knee, left ankle, left foot, back, body and all parts injured or affected by injury including any and all

[2] Form K-WC E-1, Application for Hearing filed November 16, 1999.

[3] The Division’s records do not contain a Form K-WC 1101-A Employer’s Report of Accident for either a January 1, 1997, or a January 1, 1998, accident. However, there is an Employer’s Report of Accident which was filed on June 12, 2000, dated June 9, 2000, for an alleged left knee injury from a trip and fall on May 31, 2000.

systems."[4] It is uncontradicted that this Application for Hearing was claimant's first written notice to respondent concerning her alleged injury of January 1, 1997. Thereafter, respondent paid claimant permanent partial disability payments from May 16, 2001, through November 6, 2002, at the rate of $287.63 per week for a total amount of $10,354.68. Hospital and medical treatment was also furnished in the amount of $12,938.62.

PRINCIPLES OF LAW

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 44-557 states in part:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.
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> . . . .
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> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the

[4] Form K-WC E-1, Application for Hearing filed May 10, 2001. In testimony at the Preliminary Hearing, Docket No. 265,611, claimant stated she slipped and fell on January 1, 1997, rather than January 1, 1998, as set out on her Application for Hearing. See P.H. Trans. (July 20, 2007) at 7-8. At the regular hearing, Judge Avery announced the date of accident alleged as January 1, 1997.

last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

In *Graham*,[5] the Kansas Supreme Court stated:

> Claimant's contention in effect is that notwithstanding the fact the time had gone by within which he could file his claim for compensation, and several months had elapsed, the fact this employer paid him something as compensation revived his lost right to file his claim and recover compensation. We cannot agree to this view. When the time provided by statute within which to file a claim for compensation has passed the right to recover compensation under the statute is lost and cannot be revived by subsequent voluntary payments of compensation by the employer. We regard this as the proper interpretation of the statute and to be consistent with our former decisions.

ANALYSIS

On July 20, 2007, a preliminary hearing was held wherein claimant was requesting medical benefits, including or in the form of psychological treatment. On July 24, 2007, the ALJ denied claimant's request, finding that although claimant sustained an accidental injury that arose out of and in the course of her employment with respondent and that she gave timely notice, she failed to provide respondent with a timely written claim. Claimant appealed this issue to the Board, and a Board Member affirmed the ALJ, holding:

> K.S.A. 44-520a(a) requires claimant to serve respondent with a written claim for compensation within 200 days after the date of accident or the last payment of compensation. Under certain circumstances, this time period may be extended to one year. The ALJ determined that "[w]ritten claim was not timely"[6] but he did not make a specific finding as to either claimant's date of accident or when written claim was served upon respondent. Claimant alleged a date of accident of January 1, 1998, in her pleadings, but she testified to an accident date of January 1, 1997, at the preliminary hearing.
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> Claimant does not allege she gave respondent any writing that constituted written claim before she filed her Form E-1 Application for Hearing. Instead, claimant argues that her Form E-1 Application for Hearing was her written claim. Claimant filed an Application for Hearing on May 10, 2001, with the Division of Workers Compensation. It was served on respondent at approximately that same time. This was more than 200 days and also more than one year after either January 1, 1997, or January 1, 1998, but claimant argues that this claim was timely because respondent subsequently provided her benefits (compensation). However, voluntarily providing workers compensation benefits after the time for filing written

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[5] *Graham v. Pomeroy*, 143 Kan. 974, 975, 57 P.2d 19 (1936).

[6] ALJ Order (July 24, 2007), Docket No. 265,611.

> claim has expired does not toll the statute or extend the time for filing written claim. The material question is whether respondent provided any compensation within 200 days or one year of the date of accident. Respondent acknowledges providing claimant medical treatment beginning in August 1999 but denies that this treatment was for injuries claimant suffered in a slip and fall accident in either January 1997 or January 1998. There is no evidence that respondent provided claimant compensation within either 200 days or one year of either January 1, 1997, or January 1, 1998, for the injury alleged in this docketed claim. Therefore, based on the record presented to date, claimant has failed to prove she served respondent with a timely written claim.[7]

There has been no subsequent evidence in the record concerning the issue of timely written claim. At oral argument before the Board, counsel for claimant said that any medical treatment respondent provided before 2000 was not for the injuries alleged in this docketed claim and that there were no writings associated with that or subsequent treatment that would constitute a written claim for compensation in this claim before the Application for Hearing filed on May 10, 2001. The Board adopts the findings and conclusions in its Order of October 26, 2007. Regardless of whether claimant suffered personal injury by accident on January 1, 1997, or January 1, 1998, claimant failed to provide respondent with a written claim for compensation within one year of either date. In addition, claimant has not alleged that she was provided medical treatment or any other compensation from respondent within one year of either date and that such a payment tolled the time for filing her written claim. The Board affirms the ALJ's finding that claimant failed to prove she made a timely written claim for compensation. Therefore, this claim must be denied.

Docket No. 267,234

FINDINGS OF FACT

In Docket No. 267,234, claimant asserts she injured her "neck, back, arms, shoulders, legs [and] associated body parts" in a series of accidents from May 31, 2000, to April 24, 2001, caused by "performing repetitive lifting, bending, and twisting in [the] course of employment."[8] She contends the problems worsened as she continued to work. She also testified that the pain has continued and has worsened after she was terminated from respondent.

Dr. Vito Carabetta, who is board certified in physical medicine and rehabilitation, examined claimant on August 25, 1999. At that time, claimant had complaints of pain in

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[7] *Delgado v. IBP, Inc.*, Docket Nos. 265,611 and 267,234, 2007 WL 3348518 (Kan. WCAB Oct. 26, 2007).

[8] Form K-WC E-1, Application for Hearing filed June 8, 2001.

her trapezius musculature, in her upper back area, upper anterior chest area, both arms, and neck. She had pain towards the sacral region and discomfort in her lower limbs. This examination pre-dated the series of accidents alleged in this docketed claim.

After his examination, Dr. Carabetta diagnosed claimant with fibromyalgia. He opined that her condition was a rheumatologic condition not caused by her work. With this condition, he would expect her symptoms would worsen with activity and that she would have some degree of pain at all times, but any increase in activity, either at work or at home, would cause her to feel more pain. Dr. Carabetta opined that because claimant had been out of the work force for seven years and continued to worsen, she was worsening because of the nature of the underlying rheumatologic condition. Dr. Carabetta performed electrodiagnostic studies on claimant's low back in January 2001, which revealed she had some limited evidence of a S-1 radiculopathy. He said that fibromyalgia would not have caused this positive EMG result.

Claimant saw Dr. Delgado on January 17, 2000, at the request of her former attorney. This examination likewise pre-dated the alleged starting date of the series of accidents in this docketed claim. At that time, Dr. Delgado found she had myofascial complaints to the cervicothoracic region caused by the type of work she performed. He found objective evidence of guarding and spasm, as well as trigger points involving the shoulders. She had no trigger points involving the lower lumbar, hip or leg areas. He did not think she had fibromyalgia. Dr. Delgado saw claimant again on June 9, 2000, at which time he rated her as having a 6 percent upper extremity impairment to each shoulder which translated to a 4 percent whole person impairment. He also rated her as having a 5 percent whole person impairment for shoulder girdle region complaints. These shoulder ratings are related to her workers compensation claim in Docket No. 250,157.

Claimant was seen by Dr. Edward Prostic at the request of the ALJ on February 29, 2000. Dr. Prostic commented that she had a constellation of complaints but that her greatest physical complaint appeared to be a rotator cuff tendinitis of the left shoulder. He continued to see her through May 9, 2000. He found no abnormality about the cervical or lumbar spine. He believed her predominant problem was instability of the shoulders, left worse than right. He rated her as having a 10 percent permanent partial impairment of the body as a whole for the symptomatic instability of her shoulders.

Dr. Lynn Curtis is board certified in physical medicine, rehabilitation, and spinal cord injury. He examined claimant on June 4, 2001, at the request of claimant's attorney. Claimant told Dr. Curtis that she slipped and fell at work in January 1997 and twisted her left knee, and that after surgery in December 2000 she had residual symptoms. At the time claimant saw Dr. Curtis, she mostly complained of pain in her low back. However, she told him that as far back as 1997 she had left arm, neck and back pain. Dr. Curtis rated claimant as having a 7 percent impairment of the left upper extremity for her left shoulder, which he said was related to cumulative trauma claimant suffered from 1996 through 1999

and would be for the same injury for which claimant was rated by Drs. Prostic and Delgado.

Dr. Curtis further rated claimant as having a 7 percent permanent partial impairment of the left lower extremity for her meniscectomy and patellofemoral syndrome. He said this rating would not have been included in the ratings by Drs. Prostic and Delgado. He further said that claimant's left knee impairment was due to the slip and fall injury in January 1997.

Dr. Curtis also rated claimant as having a 5 percent permanent partial impairment to the body as a whole for her low back. He testified that in his opinion, claimant's S-1 radiculopathy was caused by her work at respondent, which included frequent bending, constant standing, and lifting up to 60 pounds. He related claimant's S-1 radiculopathy to an accident date of January 12, 2001. He said that claimant said she had been complaining about back and leg symptoms before that date but that January 12, 2001, was the date her complaints were documented.

Dr. Curtis placed respondent in a modified light capacity. His restrictions were that she have a sit/stand option at work and be able to change positions every hour; lifting from the waist to the shoulder be limited to 10 pounds frequently and 20 pounds occasionally; no lifting above the left shoulder; occasional bending and stooping; and no kneeling or crawling. He said that use of a hook & knife up to 60 pounds would be outside her restrictions, as would be packaging guts if that required lifting up to 20 pounds frequently. She could use an air hose with her right upper extremity. If cleaning teeth was above shoulder level, she could not perform that task. Dr. Curtis reviewed the task list prepared by Mr. Langston and gave a task loss opinion. He said that claimant was employable but would have to work within her restrictions.

Claimant was seen by Dr. Peter Bieri on October 31, 2001, for an independent medical examination ordered by the ALJ in Docket No. 265,611. In the joint letter from the parties' counselors, he was to examine claimant for injuries she sustained in a slip and fall that occurred on January 1, 1998.[9] He testified that when he asked about injuries from the slip and fall, she made reference to pain in her neck, low back and upper extremities, which she related to repetitive use of a hook and knife. Later, however, she indicated she may have injured her knees. Dr. Bieri then focused his examination on her knees. He found no abnormality in her right knee, but he found she had tenderness to palpation in the patellofemoral region of her left knee, along with an increase in subjective complaints of pain when he performed strength testing. Dr. Bieri rated claimant as having an 18 percent permanent partial impairment of the left lower extremity, which he related to her slip and fall and the fact that she continued to work after the injury. He did not evaluate claimant for any aggravation of her back, neck or right knee.

[9] Subsequent testimony from the claimant indicates that this date was incorrect and that she, in fact, alleges she fell on January 1, 1997.

Dr. Kimball Stacy examined claimant on May 6, 2003, at the request of claimant's attorney. Claimant told Dr. Stacy that starting in 1999, she developed pain in her shoulders and upper back. That condition worsened while working and was relieved with rest. She complained of numbness and tingling into her arms and hands, upper back and anterior chest wall pain, and headaches. Dr. Stacy diagnosed her with myoligamentous pain syndrome. He agreed with Drs. Delgado and Prostic that claimant has chronic shoulder instability, which was probably the underlying and causative reason for her myoligamentous pain. Dr. Stacy believed claimant's chronic shoulder instability was caused by the repetitive injuries she suffered while working. His report indicated that claimant's pain began in November 1999, but he testified that a review of claimant's medical records shows that her pain started five to six months earlier.

Dr. Stacy believed that claimant's fall at work on January 1, 1997, caused injury to her left knee and low back. From a review of Dr. Stacy's report, it does not appear that he examined claimant's lumbar region. He said it was possible that the fall irritated her upper back and neck injuries, but she did not seem to develop those symptoms until sometime after the fall.

Dr. George Fluter, who is board certified in physical medicine and rehabilitation, evaluated claimant on September 11, 2007, at the request of the ALJ. Claimant complained to him of pain affecting the back of her head, her neck and upper back, her middle back, her low back, both shoulders, both arms, her left knee, her left ankle, and both feet. She advised Dr. Fluter that she had a work-related injury in January 1997 when she slipped and fell at work. She also told him she had a series of repetitive traumas while working with a knife and hook about August 1999. She told him that from May 2000 to April 26, 2001, she used scissors to trim meat and had been packing tongues, which resulted in swelling in her right arm, pain in the neck, both shoulders, and arms, pain in the back at waist level, and pain in her left ankle and knee.

Claimant did not tell Dr. Fluter that most of her injuries were suffered in her slip and fall in 1997, although she testified to that in the preliminary hearing of July 20, 2007. He was not sure that he understood what injuries she claimed to result from the slip and fall when he evaluated her.

Dr. Fluter diagnosed claimant with neck and upper back pain, bilateral shoulder pain/impingement, low back pain, and myofascial pain affecting the neck and back.

Using the AMA *Guides*, Dr. Fluter rated claimant as having a 5 percent impairment related to the cervicothoracic spine under DRE Category II. He also rated her as having a 5 percent impairment related to lumbosacral spine under Category II. With regard to claimant's shoulder impingement, he rated her as having a 5 percent impairment to each of her upper extremities, both right and left, which converted to a 3 percent whole body impairment. All his ratings combined for a 16 percent permanent partial impairment to the

body as a whole. He did not apportion his ratings between injuries she suffered before May 31, 2000, and the injuries she suffered after that date.

Based on the information he had, he believed there was a causal contributory relationship between her condition and the activities she performed between May 2000 and April 26, 2001. He based this conclusion, in part, upon claimant's telling him that she had certain physical symptoms as she worked during that period of time.

On cross-examination, Dr. Fluter agreed that Dr. Hutchinson's records indicate that she claimed multiple conditions resulting from her slip and fall, including low back pain. He agreed that on August 3, 1999, claimant was complaining to Dr. Hutchinson of pain in both upper extremities, her neck and her back. Those would be the same areas of injury for which Dr. Fluter assigned impairment. On May 31, 2000, claimant was complaining of pain in her left leg and low back, and she testified on July 20, 2007, that pain was caused by the slip and fall. He did not get information when he examined her as to when she started to have low back pain. He testified that some portion of his impairment ratings would relate to injuries claimant suffered prior to May 31, 2000.

Dr. Fluter agreed that Dr. Delgado rated claimant as having a DRE cervicothoracic DRE Category II, 5 percent whole body impairment of the cervical spine, on June 9, 2000, which was the same rating he gave claimant for that area. Dr. Delgado also assigned impairment for each of claimant's shoulders on June 9, 2000, of 5 percent for each shoulder, the same rating Dr. Fluter gave. Dr. Fluter agreed that these impairment ratings predated any injuries she may have suffered while working from May 31, 2000, to April 24, 2001. He agreed that if claimant was compensated for the percentages of impairment assigned by Drs. Delgado and Prostic, she has already been compensated for the ratings of impairment he assigned to her cervical spine and shoulders. In reviewing the various ratings, he said the only other rating for claimant's low back was Dr. Curtis' rating of June 12, 2001, where he provided a 5 percent whole person rating for claimant's lumbar spine.

Dr. Fluter believed that restrictions were appropriate for claimant but did not state she was totally disabled. He recommended that she should limit her lifting to 20 pounds occasionally and 10 pounds frequently. She should avoid holding her head and neck in awkward and/or extreme positions. She should avoid activities at or above shoulder level. She should restrict activities greater than 18 inches away from the body to an occasional basis. Bending, stooping and twisting should be limited to an occasional basis. She should avoid squatting, kneeling, crawling or climbing. Dr. Fluter reviewed Mr. Langston's task list and gave a task loss opinion

Dr. Fluter did not recommend further diagnostic testing and had no therapeutic recommendations. He said she could use over-the-counter medications for pain.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. . . .
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> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[10] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[11]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[12]

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[10] K.S.A. 2006 Supp. 44-501(a).

[11] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

[12] *Id.* at 278.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[13] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[14] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[15]

ANALYSIS

Claimant is alleging injuries to her neck, back, arms, shoulders and legs each and every working day from May 31, 2000, through April 24, 2001, her last day worked for respondent. These injuries alleged in Docket No. 267,234 involve mostly the same body parts allegedly injured in Docket Nos. 250,157 and 265,611. While the reason for the ending date for this alleged series of accidents is clear, it was the last day claimant worked for respondent, the significance of the beginning date for the series is not clear. The record does not reflect anything significant about May 31, 2000, except that it was after claimant settled her claim in Docket No. 250,157 and was about the time that she began receiving treatment for her slip and fall injury. During much of this time, claimant was working in a lighter duty position than the work she had previously been performing for respondent. Claimant had surgery on her left knee on December 6, 2000. She was released to return to work with restrictions. It appears that respondent changed claimant's job assignment after her knee surgery to accommodate her restrictions.

Claimant had symptoms of neck, back, shoulder, arm and leg pain before May 2000. While her symptoms may have worsened during the last year of her employment with respondent, they also worsened after claimant stopped working for respondent. There is little evidence of any permanent aggravation from her work activities during the period alleged. Even Dr. Fluter acknowledged that he relied upon the history he was given by claimant to find a causal connection between claimant's condition and her work. He further acknowledged that most of these conditions preexisted May 2000.

The Board agrees with the ALJ's conclusion that this record fails to prove a series of accidents and injuries during the dates alleged.

CONCLUSION

In Docket No. 265,611, claimant has failed to prove she served a timely written claim for compensation upon her employer.

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[13] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[14] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[15] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

In Docket No. 267,234, claimant has failed to prove she suffered personal injuries by a series of accidents from performing her regular job duties with respondent beginning May 31, 2000, through April 24, 2001.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated November 18, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2009.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge